

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA  
  
AT CHARLESTON

IN RE: ETHICON, INC. PELVIC REPAIR SYSTEM  
PRODUCTS LIABILITY LITIGATION

MDL No.  
2:12-MD-2327

September 20, 2013  
Huntington, West Virginia

TRANSCRIPT OF TELEPHONIC STATUS CONFERENCE  
BEFORE THE HONORABLE CHERYL A. EIFERT  
UNITED STATES MAGISTRATE JUDGE

APPEARANCES (by telephone)

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1 Friday, September 20, 2013, at 2:00 p.m. in conference room

2 THE COURT: Hello, everyone. Terry Ruffner is here  
3 again for us, so I would like to remind you to identify  
4 yourself on the record before you speak so she can note who is  
5 the speaker.

6 All right. Really the only thing I have to follow up on  
7 is whether you have finished your discussions on the  
8 supplemental sweeps of the custodial files.

9 What's happened with that?

10 MR. AYLSTOCK: Your Honor, this is Bryan Aylstock.  
11 We did provide a couple of additional terms to Mr. Gage  
12 last -- this was late last week, and I don't think there was  
13 an objection to them, at least not one I've heard, but other  
14 than that, I think we're complete.

15 Is that your understanding, William?

16 MR. GAGE: Your Honor, this is William Gage. I  
17 think what Bryan may have been referring to were the hernia  
18 search terms. And as I understand Your Honor, you are asking  
19 about the custodial sweeps?

20 THE COURT: Yes.

21 MR. GAGE: Okay. On the custodial sweeps, I sent  
22 Mr. Aylstock a -- just kind of a description of how we do our  
23 process on that, how that runs, and asked him to take a look  
24 at it and then to get back with us and let us know if that was  
25 agreeable. But this would be a process that would be, you

1 know, if he agrees to it, we would apply it at future  
2 depositions. And I know that Bryan has had a busy week. I  
3 don't think he's had a chance to respond yet.

4 THE COURT: Right. I have --

5 MR. AYLSTOCK: Your Honor --

6 THE COURT: According to the transcript from last  
7 week's hearing, I believe Mr. Gage had sent you, Mr. Aylstock,  
8 a proposal on conducting these supplemental sweeps, and you  
9 had not at that point had an opportunity to look at it.

10 So am I understanding that you still have not yet had an  
11 opportunity to review it?

12 MR. AYLSTOCK: I have reviewed it, Your Honor. I  
13 haven't had an opportunity to get back with Mr. Gage  
14 specifically on it. I had a couple of, I think, around-the-  
15 edges suggestions on it.

16 I think one of the provisions was 21 days before the  
17 deposition that the documents be provided. Our original  
18 understanding was that would be 30 days. And given the volume  
19 of some of these productions of late that we may be getting  
20 to, you know, a little bit later in the call, I'd like to move  
21 that to 30 days. But other than that suggestion, I think we  
22 are in agreement with the proposal that Mr. Gage put forward.

23 THE COURT: Mr. Gage, what is -- what objection  
24 would you have to making it 30 days instead of 21 days?

25 MR. GAGE: I would -- I would love to talk to my

1 documents people. I don't think it would be a major issue,  
2 although I think the way that we had proposed it, Your Honor,  
3 was that they would give us 60 days heads-up on who they  
4 wanted to take a deposition of, and then we would then have  
5 about 38 days to go then collect and process and all that.  
6 But I can talk to my people and see, you know, what -- they  
7 gave me the proposal and said this is really what we would  
8 like to do, and I just would like to visit with them briefly  
9 on the 30-day proposal.

10 THE COURT: Certainly. Well, why don't you do that  
11 and perhaps you'll be able to reach an agreement here in the  
12 next couple of days on that.

13 That is all that I had on my agenda. So who would like  
14 to go first on your end?

15 MR. CARTMELL: Your Honor, this is Tom Cartmell.  
16 I'd like to talk about the depositions last week if that's  
17 possible.

18 THE COURT: Yes. Oh, you know, on that point,  
19 before I let you go forward, I did want to make one comment.  
20 I don't want to ever discourage any of you from calling me if  
21 you're having a problem during a deposition, but I did get a  
22 call last week -- or I guess it was last week -- I don't know;  
23 maybe it was earlier this week -- about the deposition being  
24 taken in Hamburg, Germany. And I did try to assist, but I  
25 want you all to understand that I really have no authority

1 over a German citizen giving a deposition in Germany who's no  
2 longer employed by the defendant.

3 I have no problem telling him what I think would be  
4 appropriate under the rules, but you do realize I don't -- I  
5 really have no jurisdiction over him.

6 MR. AYLSTOCK: I understand, Your Honor. This is  
7 Bryan Aylstock for the plaintiffs.

8 THE COURT: Right. I mean I'm surprised his lawyer  
9 didn't challenge me, but since he didn't, I kept talking. But  
10 anyway --

11 MR. AYLSTOCK: I believe whatever you said, Your  
12 Honor, had the desired effect. I do appreciate that.

13 THE COURT: Well, that's -- that's good news. All  
14 right. Mr. Cartmell, I'm sorry to interrupt.

15 MR. CARTMELL: Yeah, no problem at all. We did have  
16 a little more difficulty during the depositions this week than  
17 we did the week before as we had discussed, and we had two  
18 depositions you may recall this week that were on our list of  
19 priority depositions that we wanted to make sure we completed  
20 before the expert reports were due on the 23rd, and my  
21 understanding is that they may be pushed a little bit from  
22 that date now. But at any rate, there's two depositions.  
23 I'll briefly give you some background.

24 The first was Laura Angelini. She was the witness who  
25 some others have called the godmother or the grandmother of

1 the TVT. And we had her scheduled for deposition in a  
2 30(b)(6) setting on Monday for one day, and then the second  
3 day was going to be the first of two days of fact deposition,  
4 but we could not get a third day. In other words, we couldn't  
5 complete her fact deposition on a third day. So we're still  
6 waiting for another day on that.

7 We were all set to go on Monday; and as you may recall,  
8 you had told defense counsel to make sure that they could get  
9 us all the documents for the 30(b)(6) as soon as they possibly  
10 could the week before. And we did receive a production of  
11 documents the Monday before the deposition.

12 As we started going through those documents, we started  
13 noticing that there were no documents that would be -- no  
14 documents that would be responsive to the 30(b)(6) topics  
15 before the date of 2003. And this is the deposition that was  
16 going to deal with the payments made to the inventor of the  
17 TVT, Professor Ulmsten, and several other paid consultants who  
18 were involved in sort of the key studies that were -- that are  
19 at issue related to the TVT and that the defense are primarily  
20 relying on in this case.

21 So Friday, last Friday we got a call from William Gage  
22 who said that it turned out -- well, he said there was good  
23 news and bad news. It turned out that the good news is that  
24 Miss Angelini does have a lot of knowledge about that time  
25 period about the consultants. The bad news was that they had

1 been unable to locate any documents related to payments to  
2 consultants or evidence related to that prior to 2003.

3 He recommended that we go forward with the deposition  
4 because she did have a lot of information and then we could  
5 see how things go and consider, you know, additional time  
6 after that. And I had told him at that time that I, you know,  
7 I think that makes sense, let's go forward, see how it goes,  
8 and if we need to have an additional day after, we'd take that  
9 up.

10 So we went to the deposition. It was true that  
11 Miss Angelini did have a lot of information from that time  
12 period. She's a critical, critical witness from the  
13 perspective of marketing at that time period with the  
14 consultants and also with the studies during that time period.

15 What was also apparent is when I started asking about the  
16 documents from prior to 2003 and what had been done by the  
17 corporation to try to locate those documents, it became clear  
18 that she personally had really done nothing to try to figure  
19 out where those documents are. She didn't really know what  
20 the company was doing, although she was told that the company  
21 had been trying to locate these documents in the foreign  
22 affiliate. And she suspected that rather than the documents  
23 all being within the United States at Johnson & Johnson  
24 International, that they would likely be located in the actual  
25 local affiliates in Sweden and France and Italy and Germany



1 and some of these places like this.

2       When I would ask the question about, you know, are these  
3 documents -- you know, we've been told that these documents  
4 are missing or cannot be found, multiple times defense counsel  
5 made a record saying, "You know, Mr. Cartmell is calling these  
6 documents missing. I don't think that's an accurate  
7 representation of them being missing. They cannot be located,  
8 but we are looking for them. You know, we've started the  
9 process of trying to find them, and they may be found  
10 subsequently. We just need some time."

11       So we did complete the 30(b)(6) deposition. I did make  
12 the record that, obviously, you know, we want these other  
13 documents.

14       The other thing that happened that was a bit frustrating  
15 was Miss Angelini gave topics on several -- or, excuse me --  
16 testimony on several topics that really was sort of the first  
17 time we had heard some of these things about the actual mesh  
18 located in the TVT product. And specifically, for example,  
19 she testified that her belief and understanding was that the  
20 mesh in the TVT product was changed at some time in 1998 right  
21 before it was launched onto the market in the U. S. And we  
22 started talking about, you know, records and documents related  
23 to that. It was clear she didn't have any. She had not seen  
24 any. She knows that they exist. And if they do exist, we  
25 know that they have not been produced to us at this point.

1           There were a few other topics related to those types of  
2 things with the consultants that came out that if, in fact,  
3 they are true, then clearly there have been foreign documents  
4 and some we suspect within the United States that have not  
5 been produced.

6           So, anyway, what happened was we completed it, but we  
7 really didn't complete it; and, you know, we were hoping that  
8 we would get further down the road. I guess what we would  
9 ask, because I know, Your Honor, you always like to know  
10 exactly what we're asking, and I guess what we would like to  
11 happen -- and, oh, there's one other thing I needed to throw  
12 in; and that is, the day after the deposition, there were  
13 documents produced to us that would have been responsive to  
14 the payments to consultants. In other words, on the Tuesday  
15 after the Monday while we were doing the 30(b)(6) documents, I  
16 received an e-mail I believe that day or maybe the next  
17 saying, "We just got a bunch of documents that reflect  
18 payments to consultants that would have been useful during the  
19 30(b)(6) deposition related to some of the consultants."

20           Now, I don't have any idea obviously if they found those  
21 overnight the night before, but obviously we didn't get a  
22 chance to ask about those.

23           What we would specifically like, because of the deadlines  
24 and these are key issues, is we'd like an order saying that  
25 they, you know, will find and produce all of these documents

1 and certify that they have within two weeks; and then if we  
2 could get another date for the 30(b)(6) within four weeks, I  
3 think that now may be workable with respect to the expert  
4 deadlines, unless I'm mistaken about that.

5 That's the first deposition. Do you want me to pause  
6 there and talk about that before we talk about the second one,  
7 Your Honor?

8 THE COURT: Yes, why don't we pause there. And let  
9 me say that my understanding, after we had our status  
10 conference yesterday, my understanding is that Judge Goodwin  
11 is going to continue some of these deadlines, and I think -- I  
12 think Kate and Judge Goodwin thought that that was clear  
13 during the hearing. I didn't think it was all that clear that  
14 they had made -- had made up their mind to continue the trial  
15 date and some of these deadlines.

16 So if it wasn't clear to you, what I suggest you do, and  
17 perhaps irrespective of whether it was clear or not, you ought  
18 to contact Kate and talk to her about new deadlines because I  
19 believe she has been looking at various different schedules  
20 for you.

21 Has anyone talked to them, either one of them, either  
22 Judge Goodwin or Kate since yesterday's hearing?

23 MR. AYLSTOCK: Your Honor --

24 MR. GAGE: Not -- go ahead.

25 MR. AYLSTOCK: Your Honor, this is Bryan Aylstock

1 for the plaintiffs. I did get a call from Kate after the  
2 hearing and she did clarify that, yeah, in fact, we would be  
3 pushed. She was waiting to hear back on whether Bard would be  
4 sliding into a particular time, I think April, and wanted to  
5 know what Boston Scientific's position was about moving from  
6 February to March, which I understood that they were okay with  
7 that.

8 So she was double checking, but she did make clear it  
9 looks like we'll be pushed into the February setting that was  
10 the Boston Scientific, but she did make clear that the  
11 deadlines associated with the other docket control orders  
12 would be adjusted in line with the new trial date whenever we  
13 get a new date.

14 THE COURT: Great. Well, Mr. Gage, why don't you  
15 respond now to Mr. Cartmell's concerns about Laura Angelini's  
16 deposition.

17 MR. GAGE: Your Honor, this is William Gage. I was  
18 not at the deposition, so there's certain substantive issues  
19 that perhaps were mentioned at the depo that I'm not perfectly  
20 prepared to handle. This is the first I've heard about issues  
21 arising during the deposition that apparently were new pieces  
22 of information to the plaintiff.

23 I do know -- and, Your Honor, this is very disjointed, so  
24 let me give you my big picture thought and I can give you some  
25 more detail. My big picture thought is I think it would be

1 very fruitful for Mr. Cartmell and, if not me, someone else on  
2 my team to have a call, certainly no later than Monday, to  
3 discuss Miss Angelini, because it is my understanding we have  
4 already agreed to make her available for another day for  
5 deposition; secondly, that we have also agreed to put up a  
6 30(b)(6) witness, a lady by the name of Pam Downs who is  
7 currently undergoing her own personal review of where  
8 potentially responsive MedScand documents may be.

9 And it seems to me, Judge -- and this is the first that  
10 we've heard about the extension of deadlines. I just looked  
11 over at Donna Jacobs, who was at the hearing yesterday, and  
12 Donna believes we've not heard about that from Ethicon's  
13 perspective yet.

14 But my point on Mrs. Angelini is this. I know we are  
15 already committed to giving the plaintiffs another day. Now  
16 that the deadlines have been laxed -- I mean I'm totally  
17 committed to not only giving them the other day but giving  
18 them another day for a deposition on a day after Pam Downs and  
19 our own lawyers complete and are basically in a position to  
20 say we've done everything we can to look for these documents,  
21 because I agree with Tom; the last thing I want to do is put  
22 up Miss Angelini at a time before these documents are  
23 finally -- you know, we've exhausted our efforts to find them.

24 And, Judge, I will say this. Your Honor probably is  
25 sitting there thinking, well, William, or, Mr. Gage, what's

1 the root cause of this? Why are you putting up people for  
2 depositions before you've got the document production  
3 finished?

4 And, Judge, I will have to tell you, I have been very  
5 anxious to work with the plaintiffs, as Bryan and Tom I know  
6 will support me on, and they know that I've been very, very  
7 heavily engaged over the last four weeks, particularly since  
8 Your Honor has been holding these calls, to make sure we're  
9 doing what we need to be doing. And I have, I think, to the  
10 fault of my client, offered up depositions and allowed depo  
11 dates to be offered in an effort to meet the plaintiffs'  
12 request that these depositions be done often before September 23 at  
13 a time when I should have been checking with our documents  
14 people to ensure that they had sufficient time to gather,  
15 collect, and produce. And I actually got ahead of myself on a  
16 few cases. I think Miss Angelini is one of them. And if  
17 there's fault to be laid, it is probably my fault, but at  
18 least it came from an honest desire to meet the plaintiffs'  
19 request that we put these people up before 9/23.

20 So it's my hope that if we can get on a phone call early  
21 next week, we can agree on a date for Miss Angelini that will  
22 let us -- and Pam Downs, who's going to be the 30(b)(6) on the  
23 document collection issue -- to complete that work so we can  
24 close this book out on Miss Angelini and the document  
25 production.

1           The final thing I will say to Your Honor is, I think I  
2 understood what Mr. Cartmell was saying about if the mesh  
3 changed -- and I think Mr. Cartmell was suggesting that that  
4 was news to him or that that was a new piece of information.  
5 I will, just to be perfectly candid and upfront, that, I  
6 think, may have surprised some lawyers on our side. And so,  
7 Your Honor, that's another reason I'm not prepared to -- we  
8 don't have the facts yet for me to respond, but I do want Your  
9 Honor to know that there's at least one aspect of her  
10 testimony that we ourselves are making sure is factually  
11 correct. So if I could ask on Miss Angelini, if we could  
12 discuss this with Mr. Cartmell next week, I am hopeful we can  
13 reach a resolution on the entirety of her situation.

14           THE COURT: Let me propose this. You and  
15 Mr. Cartmell talk about Miss Angelini. And, Mr. Cartmell, if  
16 you are not satisfied after speaking with Mr. Gage, then  
17 provide to me a proposed order. And, Mr. Gage, you can also  
18 provide to me a proposed order on when her deposition would be  
19 scheduled, when the documents -- the remaining documents would  
20 be produced, and anything else that, Mr. Cartmell, you think  
21 needs to be covered on Miss Angelini's deposition.

22           I think I've made it clear that if people are deposed and  
23 then significant documents are produced afterwards, they're  
24 going to be deposed again. There's no other way around it.

25           MR. CARTMELL: This is Tom Cartmell. I appreciate

1 that, Your Honor, and I think that's a real good idea. We  
2 will do that.

3 I do want it to be clear for the record that these  
4 documents that we're talking about are not MedScand documents.  
5 These would be documents owned by Johnson & Johnson. And, you  
6 know, it just -- obviously you know my frustration because I  
7 feel like we can never get ahead of the game or complete depos  
8 as we storm towards trial, but we will definitely do that and  
9 hopefully get you something, if we can't agree, early next  
10 week, just so we can get everything back on the calendar fast.

11 MR. GAGE: And I agree, Your Honor; your solution is  
12 a good one.

13 THE COURT: All right. Let's talk about the next  
14 deposition then, Mr. Cartmell.

15 MR. CARTMELL: The other one is Carrie Brennan. She  
16 was another deponent we wanted to make sure we took. She's  
17 very involved in the post-marketing surveillance and adverse  
18 event reporting. And I don't know exactly how long before her  
19 deposition we had noticed it, but it had been a while. It had  
20 not been one that we requested, you know, in July of last  
21 year, but at any rate, we got Saturday -- the deposition was,  
22 I believe, scheduled to be Wednesday or Thursday. I think we  
23 got Saturday a hundred thousand pages from her custodial file,  
24 and then Tuesday we got another 25,000 from her custodial  
25 file.



1           So obviously we told the defense counsel that we could  
2 not go forward with that, knowing that. We -- virtually very  
3 little information prior to that time. It's just a situation  
4 of a late production. Now we have to move it back. I guess  
5 we would just ask again that, you know, we make sure we get  
6 all these documents and that we get that one back on the  
7 calendar at a mutually agreeable date but before the expert  
8 cut-off.

9           THE COURT: Well, I think what will be important on  
10 that is to find out what kind of extension you're going to  
11 get, but since you do have -- well, we assume you have all of  
12 the documents at this point, but I guess, Mr. Gage, that's one  
13 of the issues. They're very uncomfortable with the fact that  
14 they don't seem to be getting all of the documents in a timely  
15 fashion.

16           MR. GAGE: Your Honor, this is William Gage. With  
17 respect to Carrie Brennan, let me provide Your Honor with some  
18 of the facts surrounding that deposition.

19           The plaintiffs first requested the deposition on  
20 August 9, according to what I've been able to determine, and  
21 they wanted the deposition to occur before September 23. And  
22 under the PTO 38, you know, generally we're -- we try to get  
23 about 45 days' notice of the deposition, but in this case, it  
24 was slightly inside the 45 days, but we wanted to meet their  
25 request to have it done before September 23, so we agreed to a

1 depo date of 9/19, September 19.

2 This was a new witness, meaning it was not a situation  
3 where we were going to update an existing production. It was  
4 a first-time collection, first-time production. So we went  
5 out and we gathered those documents and then we produced them.

6 On September 5, about 12 days before Miss Brennan's  
7 deposition, we sent plaintiffs a chart showing the status of  
8 the custodial document production for our September deponents,  
9 and we indicated in the chart that there was only one deponent  
10 out of eleven for whom the production was neither complete or  
11 substantially complete, and that was Miss Brennan. And we  
12 told plaintiffs in that chart that the production would be  
13 complete on September 16, which would be about 38 days after  
14 receiving the request for the depo.

15 So it would be, you know -- we were trying to get it done  
16 and stay within what the Court would want us to do. And we  
17 told the Court that -- I'm sorry. We told the plaintiffs'  
18 lawyers that Miss Brennan was updated, her file production had  
19 been updated and complete through June of 2011. So we had to  
20 do a new collection for post-2011, for June 2011, but we had  
21 already produced stuff through June 2011. And we indicated in  
22 the chart that the supplemental collection was conducted in  
23 August 2013 shortly after plaintiffs identified her as a  
24 deponent.

25 We actually beat our self-imposed deadline of 9/16,

1 meaning we said in the chart we would have it done on 9/16.  
2 We were able to get it out the door on Friday, 9/13. But  
3 still, nonetheless, I called Bryan. I tried to call. I  
4 couldn't get him. So I called Bryan and I let him know late  
5 Friday that, you know, that these additional documents were  
6 coming and that we would get the disk into his vendor's hands  
7 and give me the Saturday delivery date so I could get that to  
8 him.

9 So when they got -- and I told him it was going to be a  
10 lot of documents. I didn't know precisely, but I knew it was  
11 a lot. And then, Judge, it's my understanding -- I could be  
12 completely wrong about this. It was my understanding that --  
13 it sounds like a ton of pages, but it was my understanding  
14 that a lot of these pages are like these long Excel  
15 spreadsheets and that when you look at things like e-mails,  
16 it's a vastly smaller number. But, nonetheless, it's still a  
17 lot of documents.

18 And so when the plaintiffs indicated that they were --  
19 that this was just not -- you know, just too much for them to  
20 review before the deposition, I said -- I told my guy who was  
21 boots on the ground with that particular witness, "Immediately  
22 offer them a choice. If they want to go forward, they can,  
23 but if they want to reschedule, we'd be glad to reschedule."  
24 And so before anybody apparently got on planes or whatever, we  
25 were able to agree that we would reschedule and we were

1 certainly going to provide them a new date for the depo.

2         So, Judge, this is an example again of, you know, we --  
3 they made a request and we tried to get it in before the 9/23  
4 deadline, which was a 43-day window. We did tell them it was  
5 not going to be complete until 9/16. So, you know, those are  
6 the facts that surround this particular depo.

7                 MR. CARTMELL: Your Honor --

8                 THE COURT: Well, I certainly -- I certainly cannot  
9 fault you, Mr. Gage, for your effort, because I don't think  
10 there's anything else you could have done based on what you've  
11 just stated. It sounds to me like it's one of those things  
12 that occasionally happens and you just need to get a new date  
13 for her deposition. But it sounds like you've done everything  
14 you can do as far as getting the records to them.

15                 Mr. Cartmell, is there something else you wanted to say  
16 on that one?

17                 MR. CARTMELL: I did. You know, based on what  
18 you've just said, I guess I disagree in a certain respect only  
19 because Miss Brennan was the -- I think the -- for a huge  
20 amount of time, the individual that was responsible for  
21 adverse event reporting on the TVT products, and everything  
22 went through her. She wrote -- you know, when they would make  
23 a determination regarding whether or not an adverse event was  
24 related to the TVT products, she was responsible for sorting  
25 that whole process through with the medical directors and

1 things like that.

2       So I guess my feeling very strongly is that those were  
3 all documents that should have been produced way back when we  
4 specifically asked requests for production of documents  
5 related to adverse events, and the spreadsheets are related to  
6 adverse events and so are other documents. And then, you  
7 know, that's not even taking into consideration the Rule 26  
8 sort of duty that I think they have with all relevant  
9 documents. I mean these are documents that I would not  
10 believe they need a request specifically for Miss Brennan's  
11 deposition because she was the holder of all the post-  
12 marketing surveillance documents.

13       So I understand and I anticipated that Mr. Gage would say  
14 that. What's frustrating is that we believe those documents  
15 that came from her custodial file should have been produced  
16 months ago, and they weren't.

17       THE COURT: Well, it looks like you have them now.  
18 So probably the next step here is just to get a new date for  
19 her deposition.

20       MR. CARTMELL: Okay. And I'll work with Mr. Gage to  
21 do that.

22       THE COURT: You can update me next week.

23       MR. AYLSTOCK: Your Honor, this --

24       THE COURT: If you need to update me next week, you  
25 know, remember to put that on the agenda.

1 MR. CARTMELL: Okay. Thank you again, Your Honor.

2 MR. AYLSTOCK: Your Honor, this is Bryan Aylstock.

3 I won't say anything more about Miss Brennan, but it does -- I  
4 did want the Court to be aware when it comes to this --  
5 whether it's 30 days or 21 days -- well, another thing just to  
6 point out is sometimes when they're produced, they're corrupt  
7 files, which happened here, and then we have to go back and  
8 forth. But even beyond that, it takes time to upload these  
9 documents with our vendor, and in some cases it takes five  
10 business days.

11 Now, we did everything we could and twisted arms to get  
12 them uploaded sooner, but the volume of documents that are  
13 coming in make it such that we -- 21 days really kind of turns  
14 into 14 days, and there's just a lot to assimilate in a small  
15 period of time. So that's kind of why the 30 days is very  
16 important to us.

17 THE COURT: Well, that's something I want you and  
18 Mr. Gage to talk about and try to reach some agreement on. I  
19 understand what you're saying. I think it's difficult on both  
20 sides. But as far as Miss Brennan's deposition goes, it  
21 appears we've done all we can do on that one. You've got the  
22 documents now. You just need to get a new date.

23 MR. AYLSTOCK: Yes, Your Honor.

24 THE COURT: So what else do we have on the agenda?

25 MR. GAGE: Your Honor, since we're talking about

1 depositions, there is -- there is one issue that we need to  
2 raise, and that concerns Pete Hinoul. Your Honor will  
3 remember him. He's the current -- I think he's the current  
4 medical director, and he's obviously an important witness.

5 The current situation -- and I'm not -- I don't have the  
6 full history in front of me, but I don't think the history is  
7 relevant. I think kind of where we are, is Your Honor may  
8 remember from prior calls, Dr. Hinoul is one of our more  
9 difficult witnesses to schedule because of his business  
10 activities within the company. He's obviously a very high-  
11 ranking and very important witness. And we have agreed to  
12 provide him for -- is it two more days?

13 We've agreed to provide him for deposition for two more  
14 days to the MDL plaintiffs and that those deposition dates are  
15 currently scheduled for next week.

16 MS. JACOBS: October 3rd and 4th. October 3rd and  
17 4th.

18 MR. GAGE: Okay. October 3rd and 4th is when  
19 they're currently offered for. And I believe that we've been  
20 advised that the plaintiffs are not going to be able to accept  
21 those dates. And, Your Honor, that does create a hardship on  
22 us.

23 Mr. Hinoul -- or Dr. Hinoul is not available at the same  
24 time that Miss Jones can be available to defend that  
25 deposition until probably early November, early to mid

1 November, and so we really need for that deposition to go  
2 forward on those dates. I think Your Honor may remember --  
3 and I don't, again, don't have all the details, but I know  
4 that these depo dates, we have been asked to move these depo  
5 dates for him two, three, and maybe -- this may even be the  
6 fourth time that we've been asked to move these depo dates.  
7 And it's really creating a hardship for the witness, and we  
8 would ask that the deposition be permitted to go forward on  
9 the October 3 and 4 dates that are currently outstanding.

10 THE COURT: Who wants to respond to this? I do  
11 remember Dr. Hinoul. His name came up probably -- what? --  
12 two months ago? Several status conference -- several of these  
13 conferences ago we were talking about Dr. Hinoul.

14 Was he the one that was supposed to testify in Missouri  
15 or something and then that was canceled and he became  
16 available? Am I thinking of the same person?

17 MR. GAGE: Judge, that's it. You remembered it  
18 well.

19 MR. AYLSTOCK: Yes, Your Honor.

20 THE COURT: So what is the problem, Mr. Aylstock? I  
21 mean I do recall these depositions have been scheduled and  
22 canceled and scheduled again.

23 Why can you not take Dr. Hinoul's deposition as scheduled  
24 on the 3rd and the 4th?

25 MR. CARTMELL: Well, Your Honor --



1 MR. AYLSTOCK: Mr. -- go ahead, Tom.

2 MR. CARTMELL: This is Tom Cartmell. If you don't  
3 mind, I'll respond because I've been more involved in that.

4 If you'd go back to what we talked about originally was  
5 that there was a need to get Dr. Hinoul's deposition before  
6 September 23rd; and because Dr. Hinoul was not going to be  
7 available for trial purposes, that was going to be difficult  
8 to do.

9 The hearing came up on the 19th and 20th, and that was  
10 the day when Dr. Hinoul was scheduled. And because Kate --  
11 and Judge Goodwin had made it clear through Kate that he  
12 wanted to make sure everyone was there for the hearing. The  
13 other side was willing to reschedule.

14 That is the only time that Dr. Hinoul had been scheduled  
15 for deposition following his original -- from his original  
16 deposition. And then I think there was some communication  
17 about trying to do it after Angelini or before, but he was  
18 going to be unavailable. So that was canceled for that  
19 reason.

20 They then -- it took a while, but they were willing to  
21 give me additional dates when they figured out that he was not  
22 going to be in trial, and the dates they gave me were the 3rd  
23 and 4th of October. I literally at that point, because  
24 there's three of us that have spent literally 50 hours-plus  
25 each related to the topics that Hinoul is going, you know, to

1 be deposed on, and all three of us cannot be available on that  
2 date.

3 I cannot be available on that date, frankly, for a  
4 personal reason. I'm a municipal judge at night, and I have  
5 put off an appeal in my -- on -- I do it every other week.  
6 And I literally cannot do it again. So I asked Kirk and the  
7 other lawyer if they can cover it. Kirk is in trial, a two-  
8 week trial during that date, and the other lawyer is doing  
9 another deposition on those dates and was unavailable as well.

10 So -- and, frankly, the feeling was once Kirk and I  
11 couldn't be in it, there was no way we were going to be able  
12 to do it anyway. So I had asked them to give me dates the  
13 second week of October, I think. And I can't remember, Donna,  
14 if I asked for the third week. But the response -- we waited  
15 for a period of time, and the response was he's not -- he  
16 needs to go -- available any other time; he needs to go  
17 forward on that date.

18 Now, I told these guys, look, if we can't do it until  
19 later than that, it may be at our own peril, and I do  
20 understand that. But I promise you, Your Honor, there has  
21 been -- you can count on one hand the number of times that we  
22 have ever really turned down dates on key witnesses from them.

23 There have been multiple times when they have told us no  
24 way, we cannot do depositions then. We don't pass up dates if  
25 we absolutely cannot pass them up. And this is the first time

1 I'm hearing that Dr. Hinoul cannot be available till November.  
2 I was hoping that we could get two dates, you know, in  
3 October.

4 If we can't do it in November -- or, excuse me -- in  
5 October, then, you know, I would think that we would do it the  
6 first week. I just cannot get the people there October 3rd  
7 and 4th that need to do this deposition.

8 THE COURT: Well, it sounds like -- I'm sure  
9 Mr. Gage will try his best to find other dates in October, but  
10 it sounds to me as though if you don't take them -- this  
11 deposition on October 3rd and 4th, you're not going to be  
12 able to take it until November, so --

13 MR. CARTMELL: And I would appreciate it if they  
14 could try to find October dates, but I do understand that.  
15 And I will go back again and update with Kirk, you know, where  
16 he is on that trial as well, but, you know, my belief is now  
17 it's probably going to, I guess, be at our peril and it's  
18 going to be hopefully the first week in November.

19 THE COURT: All right. Mr. Gage, Mr. Cartmell will  
20 check with the other lawyer about his trial, and we all know  
21 what happens with trials. They hardly ever go forward when  
22 they're scheduled. So maybe the October 3rd and 4th date  
23 will still work out. But if not, if you would look for some  
24 other dates later in October. If that doesn't work, then  
25 you'll just have to give him some dates in November, but let's

1 do it as soon as possible.

2 MR. GAGE: Yes, Your Honor. Thank you.

3 THE COURT: All right. Is there any --

4 MR. AYLSTOCK: Your Honor, this is --

5 THE COURT: Yes?

6 MR. AYLSTOCK: This is Bryan Aylstock. We had  
7 served some 30(b)(6) notices on -- you know, we do want to  
8 nail down these mesh characteristics. It's sometimes a little  
9 disheartening when you think you have something nailed down  
10 and a witness, a key witness says, "Oh, no, the mesh is  
11 completely different" when -- so -- but when we've been  
12 operating and the documents reflect something different.

13 So there's some 30(b)(6) deposition notices that have  
14 been outstanding on the mesh characteristics and the support  
15 for certain statements in the IFU and so forth, and then  
16 there's also some other deposition dates that have been  
17 hanging out for an inordinately long time that we'd like to  
18 try to nail down specific dates for so that we can move  
19 forward and be ready for this trial.

20 THE COURT: Well, when are you and Mr. -- when are  
21 you and Mr. Gage going to talk? Early next week, correct?

22 MR. GAGE: Correct.

23 MR. AYLSTOCK: That's correct, Your Honor.

24 THE COURT: So let's -- why don't you have some  
25 details prepared, Mr. Aylstock, as to precisely what it is

1 you -- the people you want to have done, the topics you want  
2 to have done and a sort of estimated time frame of when you  
3 would like to complete those things, and you two talk about  
4 that at your conference on Monday or Tuesday.

5 MR. AYLSTOCK: Yes, we can get that out to them  
6 today. We had done that before, and, you know, we'll update  
7 that and get it right out to them.

8 THE COURT: And if you want to add these things in  
9 your proposed orders, by all means do so. As many of these  
10 things that we can get resolved, the better.

11 MR. AYLSTOCK: Yes, Your Honor.

12 MR. ANDERSON: Your Honor, this is Ben Anderson. If  
13 we could just add another agenda item for Mr. Aylstock and  
14 Mr. Gage's meeting next week.

15 At the deposition of Joerg Holste -- that's one of their  
16 German Ethicon employees that was taken at the end of July --  
17 he had testified that when there was explant -- when explants  
18 were received, both for hernia meshes and pelvic floor meshes,  
19 when they were received at Ethicon, that Joerg Holste would be  
20 the person who would fill out a form, they would go to quality  
21 assurance, and that those forms would have patient name, type  
22 of mesh, length of implant, and other identifying features;  
23 and that when they wanted a histological analysis of those,  
24 they would send it to their chief surgical outside pathology  
25 consultant, Dr. Klosterhalfen. And I asked him if that was

1 for both hernia and pelvic floor, and he says yes, and he said  
2 it was per the consulting agreement between Dr. Klosterhalfen  
3 and Ethicon.

4 And he testified -- and this is a quote -- "We always  
5 received a report when we sent meshes to Dr. Klosterhalfen,  
6 and it was entered in an electronic system where it was known  
7 what the mesh was, the application, how long it had been  
8 inside the patient and which problems they had with it."

9 So we requested -- we looked -- I had all of our people  
10 go and try to find anything like this. Of course, we believe  
11 that pursuant to the original RFPs, we should've received all  
12 such quality assurance information because it is an adverse  
13 event report, and we should've certainly gotten all of the  
14 reports back from Dr. Klosterhalfen.

15 And so we didn't find anything, and so Mr. Aylstock did  
16 send an e-mail back on September 11th to defense counsel  
17 asking for that. And then last night, Mr. Gage sent an e-mail  
18 that said that, "We have a lead on this and our team is  
19 actively pursuing it. We'll update you as soon as we get more  
20 information."

21 So I just want to make sure that this is an issue  
22 that's -- that's out there, that's being discussed, because as  
23 we are getting -- narrowing the new -- getting closer to the  
24 new expert deadline, these are the types of things, especially  
25 with histological analysis -- these are not just straight-up

1 documents. These are things that we are hoping that we're  
2 going to be getting some -- some explants to look at.

3 We're also hoping that, short of that, that we get these  
4 documents so that we can have our experts take a look at these  
5 things. And I realize that we're all busy and that there is  
6 probably good reasons why it took eight days to get back to  
7 us, but as we -- but now that this is teed up, I would just  
8 ask that we push on this, because if there's an electronic  
9 system and it's in quality assurance and it has to do with  
10 meshes that were sent to Dr. Klosterhalfen and he reported  
11 back, we would like to have all those documents, and it's just  
12 not clear why we wouldn't have gotten them in the first place.

13 So I do appreciate the fact that William said that  
14 they're looking into it, but I just hope that we can get some  
15 quick movement on it.

16 THE COURT: Mr. Gage?

17 MR. GAGE: Your Honor --

18 THE COURT: Yes?

19 MR. GAGE: Your Honor, this is William Gage. Your  
20 Honor, we did interview some people inside the company. One  
21 of them had an idea as to what was being described or where  
22 this information might be located. So we've dispatched some  
23 people to go dig and see what they could find. So I'm  
24 hopeful -- I am hopeful that next week we're going to at least  
25 be able to say we found it or we didn't find it.

1           And just so Your Honor understands, you know, we probably  
2     get, I'm guessing, two or three, sometimes four requests a day  
3     from plaintiffs on issues like this. And so what we do, just  
4     so Your Honor knows and just so the plaintiffs know, we track  
5     these. We put them on a chart. We make sure that -- and then  
6     we have calls sometimes as often as every two or three days to  
7     go through the chart of the pending requests that the  
8     plaintiffs have sent us by e-mail so that we can make sure  
9     that we are promptly and properly investigating these sorts of  
10    e-mail requests.

11           And so I just wanted to assure the Court and the  
12    plaintiffs that we have a -- we do have a structure here.  
13    When they do send us e-mails, we try our best to respond.  
14    Sometimes all we can say is we've got a lead or we're  
15    looking into it. But trust me, Your Honor and plaintiffs'  
16    counsel, we are actively charting, analyzing, and then  
17    methodically going through these requests, because it is our  
18    desire to, you know, get these things and get them out if we  
19    can find them.

20           Sometimes it's very difficult to find them, but if we can  
21    find them, I want to find them and get them out the door.

22           THE COURT: Well, we'll put --

23           MR. GAGE: Oh, Your Honor, if I could -- I'm sorry.

24           THE COURT: We'll put Dr. Klosterhalfen's  
25    histological reports on our agenda for next Friday and you can



1 update me as to where we are with those reports and whether  
2 they've been found and produced.

3 MR. ANDERSON: Thank you, Your Honor.

4 MR. GAGE: Thank you, Your Honor. And, Your Honor,  
5 if I could, I think it probably would help us also on this  
6 particular issue, Dr. Klosterhalfen, as we've discussed in the  
7 past, is the plaintiffs' expert. I'm not sure if he was -- I  
8 think he was designated as a non-retained expert against  
9 Ethicon last Monday, but if Mr. Anderson could reach out to  
10 Dr. Klosterhalfen and ask him to produce his report -- in  
11 other words, they are Dr. Klosterhalfen's reports. They were  
12 sent to Ethicon. So presumably Dr. Klosterhalfen would have  
13 kept a copy of his report. And since he is a plaintiff's  
14 expert, he could help us resolve this discovery issue by also  
15 going to Dr. Klosterhalfen and producing those reports to us  
16 as well. That will -- that's another way we can bridge the  
17 gap here, Your Honor.

18 THE COURT: Has anybody --

19 MR. ANDERSON: Your Honor, this is Ben -- sorry.

20 THE COURT: Has anybody gone to Dr. Klosterhalfen's  
21 laboratory yet to see what he has? Because it sounds to me --  
22 this subject matter has come up numerous times -- that Dr.  
23 Klosterhalfen has actual tissue, actual explants, he has  
24 reports, and I thought there was going to be some effort, some  
25 joint effort to go and catalog what he does have in his

1 possession. Has that not been done?

2 MR. ANDERSON: Your Honor, this is -- I'm sorry.

3 THE COURT: Go ahead.

4 MR. ANDERSON: I thought you were through.

5 THE COURT: I'm finished.

6 MR. ANDERSON: This is Ben Anderson. This is Ben  
7 Anderson. Your Honor, this issue came up in the Bard trial;  
8 and when Mr. Gage had requested this, I had gotten a -- we  
9 responded that we would need to meet and confer on all of the  
10 documents that he was requesting and the information that he  
11 was requesting because we felt that it was overly broad and at  
12 the time he was not our expert and since has become non-  
13 retained expert.

14 And the problem is that he works at the Düren Institute  
15 at the hospital, and so these explants and things that come  
16 in, come in from all sorts of different -- they don't just  
17 come from Ethicon. They come from -- directly from patients  
18 and surgeons and other hospitals and things like that.

19 He is not at liberty to allow lawyers from the United  
20 States to come into a German hospital and just come in and  
21 start looking at patients' information in the form of  
22 explanted tissue and medical records and things. And so Judge  
23 Goodwin had ruled on this in the Bard trial that that was not  
24 something that needed to be produced because he couldn't do  
25 that pursuant to German law. He could not just hand over

1 people's explants or pathology reports concerning his review  
2 of those.

3       So we had never agreed -- and, quite frankly, we were not  
4 going to bring it up in this call because I'd gotten an e-mail  
5 from David Thomas saying, "Let's discuss this, short of  
6 bringing it to the Court's attention," and I had agreed to do  
7 that to see if we could come to some agreement without putting  
8 this aspect of what documents they believe he should produce  
9 versus what documents we believe he can and those which he may  
10 have and may not have.

11       So we have not reached out to him yet in terms of what he  
12 has, but I do know that this particular issue, which is  
13 somewhat separate and distinct from what we're discussing  
14 here, they asked for -- he has literally thousands of mesh  
15 explants over the course of 20 years and then tens of  
16 thousands of histopathology slides. It's the largest  
17 institute for pathology in Western Europe. And so to say that  
18 he's just going to open up his laboratory because of this  
19 litigation, he cannot do that. The hospital will not allow  
20 it. German law won't allow it.

21       Now, a separate and more discrete issue here is -- and I  
22 appreciate where Mr. Gage is coming from with regard to, well,  
23 why can't Professor Klosterhalfen just produce it and that  
24 would help us out.

25       The point is that they are a party defendant here. I

1 don't disagree that we will certainly ask him for anything  
2 that he has. Okay. We will do that. But he's not a party  
3 defendant, and they have quality assurance files, and we would  
4 like to know for purposes of when they were produced, what the  
5 system was that was in place, whether or not they accurately  
6 recorded it, what they recorded and when. We have a right to  
7 those type of documents. And so maybe what Professor  
8 Klosterhalfen has may supplement that, but certainly it  
9 shouldn't be in substitution for their requirement and  
10 obligation to go and find these, or at least try to find them,  
11 and to produce them to us for an assortment of reasons.

12 So they are discrete issues, but what Professor  
13 Klosterhalfen can and cannot produce is something that we were  
14 going to have a call on next week, because certainly he can't  
15 open up his lab because of the litigation here.

16 THE COURT: Well, that's fine, and I don't think  
17 Mr. Gage is suggesting that Dr. Klosterhalfen become their  
18 document producer. I think what he's saying is, if you want  
19 to see these things and Dr. Klosterhalfen has them, then why  
20 don't you just ask him to give them to you while they're  
21 trying to find them.

22 I mean I hear what you're saying, but there also has to  
23 be a little bit of common sense in here. If these are  
24 documents that he prepared for Ethicon, I don't see how he can  
25 claim that he can't give them to Ethicon. You're asking for

1       them from Ethicon. If you can get them directly from him,  
2       what difference does it make?

3               I'm not saying that Mr. Gage does not have to answer your  
4       requests. Of course he does. But, you know, to me this is a  
5       tug of war that just makes no logical sense. So I think if  
6       you can get -- if you can get documents from Dr. Klosterhalfen  
7       that pertain to Ethicon -- Mr. Gage is telling you Ethicon  
8       doesn't care; go ahead and get them -- I think you ought to  
9       try to get them.

10              And in the meantime, Mr. Gage, you still need to look for  
11       them on your end because I hear Mr. Anderson saying that it's  
12       more than just the histological report, that you have other  
13       documents pertinent to these histological reports. So you  
14       both need to look at that. But I also think --

15              MR. ANDERSON: Thank you, Your Honor. This is Ben.

16              THE COURT: I also think --

17              MR. ANDERSON: Oh, I'm sorry.

18              THE COURT: -- that this Dr. Klosterhalfen issue  
19       comes up over and over and over and over again. You know, I  
20       don't understand why no one to this point, why there hasn't  
21       been some discussion already about what is he allowed to turn  
22       over, what would pertain to the plaintiffs in this case, what  
23       might be Ethicon's property. I don't understand why that  
24       hasn't happened already since he appears to be a very  
25       important witness in the case, but --

1 MR. GAGE: Your Honor --

2 THE COURT: Yes?

3 MR. GAGE: -- this is William Gage. I have a letter  
4 dated August 21, 2013, addressed to Mr. Anderson that David  
5 Thomas and I put together, and it contains our very specific  
6 requests of what we are requesting from Dr. Klosterhalfen and,  
7 more importantly, what we're not. And just so that everyone  
8 understands, our requests -- because you'll remember, Your  
9 Honor, that he was a former consultant for Ethicon. What we  
10 are requesting, what we requested that Ben go to Dr.  
11 Klosterhalfen and have produced to us are the documents that  
12 pertain to his work for Ethicon.

13 Similarly, with regard to any pathology or mesh samples,  
14 that sort of thing, we are asking that he produce to us only  
15 those mesh samples that pertain to Ethicon. In other words,  
16 Mr. Anderson talked about Judge Goodwin's prior ruling and the  
17 scope of, you know, his data base with all these meshes from  
18 other manufacturers. We're not asking for that. We're asking  
19 only for materials that relate to his former work as an  
20 Ethicon consultant, but we've been very sensitive to that, and  
21 that's spelled out very, very specifically in our letter to  
22 Mr. Anderson of August 21.

23 So I just wanted Your Honor to understand the scope of  
24 what we are requesting we believe is very narrow and would not  
25 violate Judge Goodwin's ruling.

1 THE COURT: Well --

2 MR. ANDERSON: Your Honor, Ben Anderson again. I  
3 want to, first of all, respond to what Your Honor had asked  
4 before as to why.

5 After one round of Bard trial that got mistried and  
6 Professor Klosterhalfen was already in the state and then they  
7 retried it, he and his wife had a planned holiday that they  
8 were going to take, and they had to postpone it in order for  
9 him to appear at the second Bard trial.

10 So when I wanted to contact him, they were on holiday and  
11 could not be contacted, and they did not come back until just  
12 this past week. And so I have been unable to forward any type  
13 of requests to him because he had made it very clear he was  
14 having -- and, more importantly, his wife was going to have  
15 nothing to do with mesh while they were finally on their  
16 holiday. So that was a practical issue that was in the way of  
17 me trying to request things. That's number one.

18 Number two. What counsel is discussing here are two  
19 different categories. One, we have no problem speaking with  
20 him and asking him to produce documents pertaining to his work  
21 for Ethicon. And I don't think that he will have a problem  
22 with producing those.

23 The second request is the more important one, and it has  
24 been asked not only for Ethicon but also other manufacturers.  
25 But let's just talk about the Ethicon. Not all of the samples

1 that he received that were Ethicon meshes came from Ethicon.  
2 In fact, most of them did not come from Ethicon, as I  
3 understand it. And he is under an obligation not to and a  
4 prohibition not to produce samples from that hospital of  
5 explanted meshes.

6 It is -- it was -- this is exactly what was ruled upon  
7 because that was what Judge -- the judge ruled upon with  
8 regard to Bard, is he could not produce medical records and  
9 actual mesh samples but rather histopathological analysis.  
10 And so he cannot do that. And we're happy to look for the  
11 documents, but in terms of mesh samples themselves, it cannot  
12 be done.

13 THE COURT: Well, that's fine, Mr. Anderson. I  
14 don't think anybody expects Dr. Klosterhalfen to do anything  
15 he's not legally permitted to do.

16 The problem that I'm trying to raise here is that Dr.  
17 Klosterhalfen has been a figure in this litigation for quite a  
18 while now and yet nobody seems to know exactly what it is he  
19 does have, what he can turn over, what he can't turn over. It  
20 seems like nobody really knows. And what I'm questioning is,  
21 why not? Why hasn't somebody by now done that?

22 I hear you saying, well, he just hasn't been available.  
23 Okay. Fine. But now maybe perhaps is the time to get that  
24 figured out before you have your expert deadlines come up.

25 So I guess that's all we can really say about Dr.



1 Klosterhalfen, but it did remind me of one thing. What  
2 happened with Mrs. Lewis's -- is it Lewis? -- her mesh? I  
3 thought everything was worked out with the hospital to get  
4 that mesh.

5 MR. ANDERSON: Yes, Your Honor, Ben Anderson again.  
6 Part of the problem is that where she had her explant, which  
7 is UT Southwest, changed their in-house protocol because their  
8 pathology department was being overwhelmed with requests and  
9 it was taking critical time away, as I understand it, from  
10 their actual performing their day-to-day duties of being  
11 pathologists and having their staff be able to process samples  
12 and have a quick enough return for their surgeons, not to  
13 mention outside requests. And so they changed their system  
14 such that now it goes through a risk management process where  
15 the request has to go through risk management. Then risk  
16 management makes the request of pathology. Then pathology  
17 gets back and tells risk management. Then risk management  
18 then reaches back out to the outside requester, which would be  
19 yours truly.

20 And so it has become a little bit of red tape, and we  
21 still do not have any of the explant material. That's the  
22 first problem, has been one of yet new layers of trying to get  
23 this from the pathology department. But the second issue  
24 that's pressing is that we had -- we worked hard to try to  
25 come up with a pathology protocol. That would be myself and

1 Mr. Gage and Mr. Snell. And after we had agreed upon it and  
2 thought that it looked good and we submitted it and we were  
3 going to have it entered as a pretrial order, I realized and  
4 sent an e-mail to William -- to Mr. Gage and Mr. Snell two  
5 weeks ago saying, "Guys, hold the phone. I need to put the  
6 brakes on the PTO. I realize that there is a mistake in the  
7 amount of sample which will be considered too small to be able  
8 to be divided." And I was off by -- it was a difference  
9 between grams and milligrams and 120 milligrams needed to  
10 actually be left than 12 milligrams.

11 And so Mr. Gage couldn't address the issue because he was  
12 getting on a plane I think to go to Chicago to do a  
13 deposition. So he turned that over to Mr. Snell.

14 Mr. Snell and I spoke a few days later, and that was, I  
15 think, two weeks ago yesterday. And I explained the problem  
16 to him, that it was a *mea culpa*, that when I went back and was  
17 discussing with my experts what we were going to do with the  
18 sample when it came out and I started discussing values, that  
19 they chuckled at me and said, you know, that's the wrong  
20 value. That is way too high.

21 And so I said -- you know, I explained to them that it  
22 was a mistake on my part with regard to how much sample we  
23 actually needed, that we needed miniscule amounts compared to  
24 what had been in the protocol. And so I did give that to  
25 Mr. Snell two weeks ago. He said he would check with his

1 people and get back to me. And I have not heard back from  
2 him. And so I would -- I'd not planned on teeing that up  
3 today, but since Your Honor asked, that's where we are. And  
4 so I would just ask that if Mr. Gage could follow up with  
5 Mr. Snell and find out if someone is going to get back to me  
6 so that we could address that ASAP, because as soon as we get  
7 the word and that sample comes out, we need to immediately get  
8 that reviewed by experts. We need to have pathology slides  
9 done, etcetera, and that is not a quick process. So I'm still  
10 waiting to hear back from the defense.

11 THE COURT: Yes, Mr. Gage, that's -- I think that's  
12 an important issue. What's the status of getting the  
13 pathology protocol worked out?

14 MR. GAGE: Judge, I know that Mr. Snell had to go  
15 call our -- he -- I know part of the reason was trying to get  
16 up with our pathologist, to have the pathologist look at the  
17 proposed recommendation from Mr. Anderson. I'll have to  
18 follow back up with him.

19 To be honest with you, Judge, I don't -- I mean Ben may  
20 have communicated this to Mr. Snell, but I don't think I even  
21 knew for certain that there was an explant until just now.  
22 But, nonetheless, I agree with you; we need to get it knocked  
23 out now that I -- I mean certainly now that I know that  
24 there's an explant.

25 THE COURT: Well, I think we all knew about the

1 explant coming from Miss Lewis --

2 MR. ANDERSON: Yes.

3 THE COURT: -- because we talked about that --

4 MR. GAGE: Well --

5 THE COURT: -- last week or two weeks ago perhaps.

6 MR. GAGE: But I --

7 MR. ANDERSON: That's correct. It's Ben Anderson.

8 That's correct, Your Honor. We have said that her surgery was  
9 coming up, and that's why the pathology protocol was critical.

10 THE COURT: Right.

11 MR. GAGE: Agreed, but it was my understanding that  
12 we were not -- that there was uncertainty as to whether or not  
13 the surgery would generate an explant. That's what I'm  
14 referring to.

15 MR. ANDERSON: Well, that's -- Ben Anderson again.  
16 That's a good point, Your Honor, is that as of right now, we  
17 don't know how much -- we know that there was an explant,  
18 so -- or at least that was the -- the surgery was to go in and  
19 remove part of the mesh. That was the anticipated surgery.

20 Now, I guess there's a chance that nothing was removed,  
21 but my sense is that the idea was that he was going to go in  
22 there and remove some mesh. How much and whether it was  
23 tissue and mesh, we still don't know because we haven't heard  
24 from the risk management office.

25 THE COURT: Okay. Well, why don't you follow up on

1 that. You know, I'm surprised that they had a different  
2 procedure in the past because seven or eight years ago when I  
3 was at CAMC, we wouldn't -- we didn't let anything go out for  
4 litigation unless there was a lawyer involved. So I'm not  
5 surprised that you're having to go through those channels, but  
6 I would expect they ought to have that issue resolved fairly  
7 shortly here. So you're going to need a protocol in place.  
8 So I urge you to move on that one. That sounds like it needs  
9 to be done ASAP.

10 MR. GAGE: And, Judge, we have a protocol in place.  
11 The only thing that I think Mr. Anderson was recommending --  
12 and it's been entered by Judge Goodwin. I think he's just  
13 recommending a modification to a phrase found in the protocol.

14 THE COURT: So there's already been a protocol in  
15 place.

16 MR. ANDERSON: I didn't think it was entered, Your  
17 Honor. Maybe I'm wrong.

18 MR. GAGE: I thought Judge Goodwin signed it.

19 THE COURT: He may have. I'm not aware if he did,  
20 but then it's really hard to keep up on everything that gets  
21 filed in these cases --

22 MR. ANDERSON: Amen. This is Ben Anderson. Sorry.

23 THE COURT: -- when they're not right in front of  
24 me.

25 Well, we're at our hour mark. Unless there's something

1 really critical that needs to be discussed right now, if  
2 there's anything left over, we can pass it to next Friday.

3 MR. AYLSTOCK: Your Honor, this is Bryan Aylstock.  
4 I did have a couple of other things, but Mr. Gage and I can  
5 speak on Monday and hopefully resolve them.

6 THE COURT: Great.

7 MR. AYLSTOCK: Or at least we'll have them on the  
8 agenda.

9 THE COURT: Sounds wonderful. Anything from the  
10 defendant?

11 MR. ANDERSON: Thank you, Your Honor.

12 THE COURT: Anything from the defendants?

13 MR. GAGE: No, Your Honor.

14 THE COURT: All right. Thank you all again, and I  
15 will talk with you next Friday.

16 MR. ANDERSON: Thank you.

17 THE COURT: Send me proposed orders if you can't  
18 agree on your depositions and whatnot.

19 MR. GAGE: Okay.

20 THE COURT: Thank you. Have a good weekend.

21 (Conference concluded at 3:05 p.m.)

22 I, Teresa M. Ruffner, certify that the foregoing is a  
23 correct transcript from the record of proceedings in the  
24 above-entitled matter.

25 /s/Teresa M. Ruffner

September 23, 2013